Tan Chew Ho v The Deputy Minister of Home Affairs & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 44–141 OF 2011
SU GEOK YIAM J
17 DECEMBER 2011

Civil Procedure — Abuse of process — Application by detainee for habeas corpus for release from detention — Notice of discontinuance filed before first hearing date — Reinstatement of application allowed — Application withdrawn at second hearing date — Whether applicant insincere about challenging legality of detention — Whether striking out without liberty to file afresh proper order to make

The applicant, who was serving a two-year detention under the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') pursuant to a detention order signed by the first respondent, applied for a writ of habeas corpus for release from detention forthwith. The applicant raised numerous allegations of fact and law to challenge the validity of his detention. Essentially, he claimed his detention was unlawful, null and void for breaches of the Federal Constitution, the Act and the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987. To counter the allegations raised, the respondents filed 11 affidavits in reply. At the first hearing date of the application, the applicant's counsel informed the court that as he had not received client's instructions, a notice of discontinuance with liberty to file afresh had been filed. The court, however, struck out the application without liberty to file afresh as it took the view that granting liberty to file afresh on the same grounds would be an abuse of process in view of the several affidavits-in-reply filed by the respondents. Liberty to reinstate the application was, however, allowed. A month later, the court allowed reinstatement of the application after accepting the applicant's explanation that his failure to proceed with the hearing on the first occasion arose out of a misunderstanding. However, on the hearing date subsequent to the reinstatement, the application was withdrawn.

Held, striking out the application without liberty to file afresh:

(1) The applicant was abusing the process of court. He was not sincere in challenging the legality of his detention and had filed the application without any serious intention of having it heard on its merits (see para 34).

(2) Striking out the application without liberty to file afresh was just and fair to all the parties. Granting liberty to file afresh would have been a waste of the court's precious time (see paras 41 & 43).

[Bahasa Malaysia summary

Pemohon, yang menjalani hukuman tahanan selama dua tahun di bawah Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) ('Akta') berikutan perintah penahanan yang ditandatangani oleh responden pertama, memohon untuk writ habeas corpus bagi pelepasan daripada penahanan tersebut. Pemohon membangkitkan banyak kali tuduhan-tuduhan fakta dan undang-undang untuk mencabar kesahan penahanannya. Pada asasnya, dia mendakwa penahanannya adalah menyalahi undang-undang, terbatal dan tidak sah kerana kemungkiran Perlembagaan Persekutuan, Akta dan Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987. Untuk membalas tuduhan-tuduhan yang dibangkitkan, responden-responden memfailkan 11 afidavit jawapan. Pada tarikh perbicaraan yang pertama permohonan tersebut, peguam pemohon memberitahu mahkamah bahawa dia tidak menerima arahan-arahan anak guamnya, notis penamatan dengan kebebasan untuk memfailkan permohonan baru telah difailkan. Mahkamah, walau bagaimanapun, membatalkan permohonan tersebut tanpa kebebasan untuk memfailkan permohonan baru memandangkan ia berpendapat bahawa memberikan kebebasan untuk memfailkan permohonan baru atas alasan yang sama akan menjadi penyalahgunaan proses mengambil kira beberapa afidavit jawapan yang difailkan oleh responden-responden. Kebebasan untuk mendengar semula permohonan, walau bagaimanapun dibenarkan. Sebulan kemudiannya, mahkamah membenarkan pendengaran semula permohonan tersebut selepas menerima penjelasan pemohon bahawa kegagalannya untuk meneruskan dengan perbicaraan pada mulanya berbangkit daripada salah faham. Walau bagaimanapun, pada tarikh pendengaran selepas pendengaran semula, permohonan tersebut ditarik balik.

Diputuskan, membatalkan permohonan tanpa kebebasan untuk memfailkan permohonan baru:

(1) Pemohon menyalahgunakan proses mahkamah. Dia tidak jujur dalam mencabar kesahan penahanannya dan telah memfailkan permohonan tanpa apa-apa niat serius untuk ianya didengar atas meritnya (lihat perenggan 34).

(2) Membatalkan permohonan tanpa kebebasan untuk memfailkan permohonan baru adalah adil kepada kesemua pihak. Memberikan kebebasan untuk memfailkan permohonan baru akan membazirkan masa berharga mahkamah (lihat perenggan 41 & 43).]

Notes

For cases on abuse of process in general, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 11–25.

Cases referred to

Malayan Banking Bhd v Teguh Consolidated Sdn Bhd & Anor and Another action [1997] MLJU 245; [1998] 1 CLJ 254, HC (refd)

Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1994] 1 MLJ 592; [1994] 4 CLJ 47, HC (refd)

Legislation referred to

Criminal Procedure Code s 365(1)(b)

Dangerous Drugs Act 1952 s 2, First Schdule, Part III

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3, 3(2), 5(1), (4), 6(1), 9(1), (2)(b)

Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 r 3

Federal Constitution art 151(2)

Rules of the High Court 1980 O 18 r 19, O 18 r 19(1)(d)

V Saravanan (Suresh Thanabalasingam) for the applicant.

Zafran Zafri bin Mohd Zaini (Senior Federal Counsel, Minister of Home Affairs) for the respondent.

Su Geok Yiam J:

BACKGROUND

[1] The applicant was detained in the Muar Rehabilitation Centre, Johor under the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') pursuant to a detention order dated 7 September 2010 for two years from 12 September 2010 issued by Datuk Wira Abu Seman Yusop, the Deputy Minister of Home Affairs ('the Deputy Minister'), the first respondent, under s 6(1) of the Act, exh 'CS1' in the affidavit in reply of police Insp Chundang Ak Sangau, the investigating officer ('the IO'), encl (9), ('the detention order').

THE APPLICANT'S APPLICATION

[2] On 8 June 2011, the applicant filed a notice of motion, at encl (3) together with a certificate of urgency at encl (4) and a supporting affidavit affirmed by the applicant on 3 June 2011 at encl (2), pursuant to s 365(1)(b)under Chapter XXXVI of the Criminal Procedure Code for the issuance of a writ of habeas corpus against the respondents for him to be released forthwith and not to be rearrested because his arrest and detention by the second respondent, the police and also his detention by the third respondent pursuant to the detention order issued by the first respondent under the Act is unlawful, null and void by virtue of breaches of the provisions of the Federal Constitution, the Act and the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 ('the Rules').

[3] In para 3 of his supporting affidavit, encl (2), he has alleged that prior to the issue of the detention order by the first respondent he was not told the reason for his arrest on 17 July 2010 by the second respondent and the police. He was detained for 60 days but he was not told the reason for his detention. The police also did not carry out any investigation against him during his detention for 60 days under s 3 of the Act.

[4] During the period of his detention by the police, the police did not accord to him his constitutional right to engage a counsel and he was, therefore, unable to challenge his arrest and detention by the police prior to the issue of the detention order by the first respondent because he was not allowed by the police to meet his family or his counsel.

[5] He has also made the following allegations of fact and law against the respondents in paras 4 to 34 of his supporting affidavit:

(a) he was never produced before the court during his detention by the police;

(b) he neither understands nor speaks English;

(c) he can only understand and is fluent in Hokkien which is a Chinese dialect;

(d) he only knew he was detained under the detention order for two years which was issued under the Act when he was brought to the Muar Rehabilitation Centre and when his counsel informed him;

(e) he was never told the object of and or the reason for his detention under the Act;

(f) his arrest is unlawful;

(g) his detention at the police station is unlawful because it was done in breach of the law, was not in accordance with the provisions of s 3(2) of the Act and he was not told the reason for his detention and the identity of the person who had authorised his detention;

(h) the reports of the investigating officer ('the IO') and the inquiry officer which were considered by the first respondent before he issued the detention order were defective thereby rendering his detention under the detention order similarly defective;

(i) the reasons are the IO did not personally record his statement which was recorded in a language which he did not understand, ie Malay, without the assistance of a Chinese interpreter, it was not read back to him in Hokkien and he was asked to sign a document and theinquiry officer was neither a qualified person nor was she duly appointed by the Minister of Home affairs in accordance with s 5(1) of the Act and the respondents

must exhibit her letter of appointment to prove that she was duly appointed to that capacity by the Minister of Home Affairs;

(j) during the inquiry before the inquiry officer, he was not provided with a Chinese interpreter and he was asked in the Malay language to give his statement;

(k) since he did not understand what was asked of him in the Malay language he just kept silent but he was asked to sign a piece of paper upon the conclusion of the inquiry;

(l) the report of the inquiry officer is defective because she did not call witnesses during the inquiry and she also did not obtain the relevant documents from the IO before she commenced the inquiry;

(m) his detention under the detention order is invalid because the Deputy Minister who issued the detention order did not scrutinise the complete investigation report which was prepared by the IO which is a condition precedent for his detention at the Muar Rehabilitation Centre;

(n) on 8 September 2010, he was served with a copy of the detention order but the contents and meaning of the detention order were not clearly explained to him and he was also not told that he could refuse to sign the form concerned thereby causing him to sign the form without understanding the contents and meaning of the detention order;

(o) when he was served with a copy of the detention order he was not served with the requisite forms under the Act, the Rules and the Federal Constitution;

(p) the detention order is invalid because it was not issued in accordance with s 6(1) of the Act;

(q) the statement of facts which formed the basis for the detention order contained elements of mala fide;

(r) there was a breach of the mandatory provisions of s 9(1) of the Act and r 3 of the Rules because, when the detention order was served on him, he was not informed of his right to make a representation to the Advisory Board against the detention order, his right to be represented by a counsel for that purpose and the meaning of representation;

(s) he was also not served with sufficient copies of the relevant form by the police in order to enable him to make a representation to the Advisory Board;

(t) there is a breach of s 9(2)(b) of the Act because the statement of facts was prepared by the assistant secretary of the Ministry of Home Affairs instead of by the Deputy Minister personally;

(u) the Deputy Minister did not apply his mind to the statement of facts and

the grounds for his detention before he issued the detention order because the statement of facts and the grounds for his detention were prepared and signed by the assistant secretary of the Ministry of Home Affairs on the same date that the Deputy Minister issued the detention order under s 6(1) of the Act;

(v) his detention under the detention order is not justified and is mala fide because he was not involved in all the incidents which were contained in the statement of facts;

(w) when he was brought to the Muar Rehabilitation Centre he was not told of his right to make a representation to the Advisory Board and his right to be represented by a counsel for that purpose;

(x) there was a breach of the provisions of the Act because he was not brought to the Muar Rehabilitation Centre on the same date stated in the detention order;

(y) although he did not request for a postponement, the Advisory Board had adjourned the first hearing date which was fixed for the hearing of his representation at the Simpang Renggam Rehabilitation Centre without informing him the reason for the adjournment and the respondents must exhibit the notes of proceedings of the Advisory Board which will reflect the reason for the adjournment;

(z) the first hearing date which was fixed for the hearing of his representation at the Simpang Renggam Rehabilitation Centre is invalid and unlawful because the Advisory Board had no power to do that, presumably, because the place for his detention which is stated in the detention order is the Muar Rehabilitation Centre;

(aa) on the second date fixed for the hearing of his representation he had applied for a postponement on the ground that he wished to engage a counsel to represent him, that he needed time to engage a counsel in Peninsular Malaysia as he is from Sarawak and his family is in Sibu but he was denied his right to do that as his application for a postponement for that purpose was rejected resulting in his failure to make an effective representation before the Advisory Board;

(ab) the notes of proceedings of the Advisory Board, if exhibited by the respondents, will reflect and support his allegation;

(ac) he did not admit the statement of facts during the inquiry before the inquiry officer but he was told by the Chairman of the Advisory Board that he had done so and his request to call the inquiry officer as his witness to prove to the contrary was rejected by the Advisory Board;

(ad) after he had denied his involvement in the incidents described in the statement of facts he was taken out of the room and he did not know the

evidence which was adduced by the police against him resulting in his inability to defend himself and to reply to the allegations against him; A

(ae) the Advisory Board was not constitutionally constituted in accordance with art 151(2) of the Federal Constitution as the Board members were neither qualified persons nor were they duly appointed by the Yang Di-Pertuan Agong and the respondents must exhibit their letters of appointment in order to prove to the contrary; and B

(af) the grounds for the detention order are outside the scope of the Act.

[6] In para 35 of his supporting affidavit he has relied on the following grounds in the Malay language to challenge his arrest, detention and the detention order: C

35. Saya juga menyatakan bahawa tangkapan saya serta penahanan selanjutnya di Pusat Pemulihan Akhlak Muar, Johor adalah tidak sah di sisi undang-undang dan tidak teratur diatas alasan-alasan berikut: D

(a) terdapat perlanggaran terhadap peruntukan Perkara 5(1) Perlembagaan Persekutuan iaitu tahanan terhadap saya adalah tidak sah disisi undang-undang;

(b) terdapat perlanggaran terhadap peruntukan Perkara 5(3) Perlembagaan Persekutuan apabila saya ditangkap serta semasa saya dihantar ke Pusat Pemulihan Akhlak Muar, Johor; E

(c) terdapat perlanggaran terhadap Seksyen 3 Akta Berkenaan iaitu penangkapan dan 11 tahanan selanjutnya tidak diikuti dengan betul dan menurut undang-undang; F

(d) terdapat perlanggaran terhadap peruntukkan Perkara 5(4) Perlembagaan Persekutuan kerana saya tidak dibawa kehadapan Majistret apabila ditangkap dan ditahan;

(e) terdapat perlanggaran terhadap Seksyen 3, 4 dan 5 Akta Berkenaan iaitu tangkapan dan penahanan selanjutnya tidak diikuti dengan betul dan menurut undang-undang; G

(f) pegawai yang menangkap saya tidak membuat tangkapan menurut Seksyen 3 Akta Berkenaan;

(g) penahanan saya sebelum perintah tahanan dikeluarkan tidak mengikut undang-undang dan pihak polis telah gagal untuk mengikut undang-undang yang sedia ada; H

(h) terdapat perlanggaran terhadap Seksyen 6 Akta Berkenaan iaitu salinan-salinan perintah yang dikemukakan kepada saya adalah bukan perintah mengikut undang-undang; I

(i) terdapat perlanggaran terhadap Seksyen 9 Akta Berkenaan iaitu saya tidak diserahkan dengan 12 alasan-alasan dan tuduhan-tuduhan fakta yang diberikan oleh Timbalan Menteri Dalam Negeri serta saya tidak diterangkan dengan maksud perintah serta alasan berkenaan;

(j) terdapat perlanggaran terhadap Kaedah-Kaedah Akta berkenaan apabila saya tidak diberitahu tentang hak representasi dan tidak diserahkan dengan dokumen-dokumen dan tidak dimaklumkan tentang tarikh pendengaran representasi saya menurut kaedah-Kaedah di Pusat Pemulihan Akhlak Muar, Johor;

(k) terdapat perlanggaran terhadap Seksyen 9, 10 dan 11 Akta Berkenaan;

(l) alasan-alasan perintah tahanan terkeluar dari skop Akta Berkenaan;

(m) perlanggaran pada hak asasi saya yang terjamin dibawah Perkara 151 Perlembagaan Persekutuan;

(n) tidak ada ketidakpatuhan undang-undang dengan terperinci berhubung dengan tangkapan dan tahanan selanjutnya adalah tidak sah mengikut undang-undang; dan

(o) Akta berkenaan tidak terpakai dalam keadaan fakta-fakta tuduhan.

Atas alasan-alasan berkenaan di atas, saya dengan hormatnya menyatakan bahawa tahanan saya adalah salah disisi undang-undang kerana ketidakpatuhan kepada Akta Berkenaan serta Perlembagaan Persekutuan dan dengan ini saya memohon supaya Writ Habeas Corpus diperintahkan seperti yang dipohon diperenggan 1 dalam Notis Usul dengan mengarahkan Responden-responden membawa saya kehadapan Mahkamah yang Mulia ini dengan serta merta dan dibebaskan.

THE RESPONDENTS' 11 AFFIDAVITS IN REPLY

[7] The respondents have filed a total of 11 affidavits in reply to deny, dispute and rebut the grounds and allegations relied upon by the applicant.

[8] The 11 were affirmed by the following persons:

(a) Dato' Lee Chee Leong, the Deputy Minister of Home Affairs, Malaysia, on 8 June 2011, encl (6);

(b) ACP Mohd Adnan bin Ismail, the Deputy Director of Detention, in the Department of Criminal Investigations, at the Royal Malaysian Police Force Headquarters at Bukit Aman, Kuala Lumpur, on 8 June 2011, encl (7);

(c) Intan Noorashikin bt Nasarudin, the inquiry officer, on 8 June 2011, encl (8);

(d) Police Insp Chundang Ak Sangau, the IO, at the Department of Criminal Investigations, Narcotics, Sarawak Police Contingent Headquarters, on 8 June 2011, encl (9);

(e) D/Kpl Ong Choon Lai, a police officer who also acted as the Mandarin interpreter for the applicant, at the Detention Division of the Simpang Renggam Police Station, on 8 June 2011, encl (10);

(f) D/L/Corp Tang Poh Loong, a police officer who also acted as the Mandarin interpreter for the applicant, at the Department of Criminal Investigations, Narcotics, at the Sarawak Police Contingent Headquarters, on 8 June 2011, encl (11);

(g) Zakaria bin Mat Jusoh, the Deputy Superintendent of Prisons and Rehabilitation Center and also the officer-in-charge of Morals, Muar, Johor, on 8 June 2011, encl (12);

(h) Hasina bt Noor Din, an assistant secretary in the Ministry of Home Affairs, on 8 June 2011, encl (13);

(i) Mastura bt Abu Bakar, the secretary to the Advisory Board, Prime Minister's Department, Malaysia, at Putrajaya, on 8 June 2011, encl (14);

(j) D/Corp Lee Jun Sin, a police officer who also acted as the Mandarin interpreter, at the Department of Criminal Investigations, Narcotics, at the Sarawak Police Contingent Headquarters, on 8 June 2011, encl (15); and

(k) Datuk Wira Abu Seman Yusop, the Deputy Minister of Home Affairs, Malaysia, on 8 June 2011, encl (16).

[9] According to the first respondent, Datuk Wira Abu Seman Yusop, the Deputy Minister of Home Affairs, Malaysia ('the Deputy Minister'), in para 7 of his affidavit in reply, encl (16), on 17 August 2010, he received the applicant's complete investigation report from the IO pursuant to s 3(3) of the Act. On 2 September 2010 he received the report of the inquiry officer pursuant to s 5(4) of the Act. After having scrutinised both the reports he was satisfied that the applicant had been or was associated with drug trafficking activities as defined in s 2 of the Dangerous Drugs Act 1952 (Act 234) ie the trafficking of syabu, a dangerous drug which contains methamphetamine which is listed in the First Schedule, Part III of the Dangerous Drugs Act 1952 (Act 234), that his activities had prejudiced the public order and that it was necessary that action against the applicant as provided under the Act be taken against the applicant.

[10] In para 8 of his affidavit in reply, encl (16), he has deposed that he then issued the detention order pursuant to s 6(1) of the Act. He dated the detention order on 7 September 2010. It directed that the applicant be detained for a period of two years from 12 September 2010 at the Muar Rehabilitation Centre, Johor, pursuant to s 6(1) of the Act.

[11] In para 9 of his affidavit in reply, encl (16), he has explained that there was a difference of five days between the date of the detention order and the date of the commencement of the detention order because the police needed

that length of time in order to make arrangements to take him from the police lock-up in Bau, Sarawak and to send him to the Muar Rehabilitation Centre.

[12] In para 11 of his affidavit in reply, encl (16), he has deposed that he then instructed his officer, Hasina bt Noor Din, to prepare three copies of the detention order for the detention of the applicant at the Muar Rehabilitation Centre, Johor for a period of two years from 1 August 2010 as he was satisfied that the applicant had to be detained because the applicant has been or is associated with activity relating to or involving the trafficking of dangerous drugs and it is necessary in the interest of public order that the applicant be detained.

[13] The court was satisfied that this was only a typographical error because the date of the commencement of the detention order is clearly stated as 12 September 2010 instead of 1 August 2010 in the detention order and also in the earlier paragraphs, ie paras 8–9 of the Deputy Minister's same affidavit in reply.

[14] In the same paragraph of his affidavit in reply, encl (16), the Deputy Minister has also deposed that he also instructed Hasina bt Noor Din to prepare the grounds for the detention order and the statement of facts which formed the basis for the detention order. He then signed the detention order. After he had signed the detention order he instructed her to sign the grounds for the detention order and the statement of facts which she duly signed.

[15] In para 14 of his affidavit in reply, encl (16), the Deputy Minister has deposed that there is no necessity for the applicant to be produced before the magistrate or the court because the detention of the applicant was made pursuant to the Act.

[16] In her affidavit in reply, encl (13), Hasina bt Noor Din has corroborated the depositions of the Deputy Minister.

[17] The detention order will expire on 11 September 2012.

THE HEARING

[18] The first hearing date was fixed on 11 August 2011. On that date, Mr V Saravanan, the applicant's learned counsel, informed the court that a notice of discontinuance had been filed with liberty to file afresh. The reason is that the counsel did not receive any instructions from the applicant.

[19] However, the court struck out the applicant's application with no

liberty to file afresh but with liberty to file for reinstatement of the application in the event that the counsel receives the instructions of the applicant to do so as it would amount to an abuse of the court process if the applicant is allowed to withdraw his application with liberty to file afresh on the same grounds after the respondents had already filed a total of 11 to deny, dispute and rebut all the allegations of fact and law which were raised by the applicant in his supporting affidavit.

[20] On 9 September 2011, the applicant filed an application to reinstate his originating motion for the issue of a writ of habeas corpus for the immediate release of the applicant together with his supporting affidavit which he had affirmed on 7 September 2011. It was fixed for hearing on 24 October 2011.

[21] In his supporting affidavit he has deposed that in April 2011 he had informed his family to engage a counsel to represent him in the instant case. He believed that in May 2011 his family had engaged Messrs Suresh Thanabalasingam to represent him. Consequently, on 8 June 2011 his counsel filed the habeas corpus application. Subsequent to that he had contacted his family several times in June and early July 2011. However, from mid July to 18 August 2011 he had stopped contacting his family.

[22] On 22 August 2011, his wife visited him and informed him that his habeas corpus application had been struck out with no liberty to file afresh. He verily believed that it had occurred because of a misunderstanding on the part of his counsel who had informed the court that he did not receive instructions to proceed with the hearing of his habeas corpus application. It arose from his failure to contact his family from mid July 2011 until 18 August 2011.

[23] Since he is desirous of proceeding with the hearing of his habeas corpus application he is applying for the leave of the court to reinstate it in order that it can be heard on merits. He verily believed that his application for reinstatement will not prejudice the respondents.

[24] On 24 October 2011, Puan Natasya bt Nazar, learned federal counsel for the respondents, did not have any objection to the applicant's application for reinstatement. The court, accordingly, granted to the applicant order-in-terms of his application. The court fixed the applicant's application for the issue of a writ of habeas corpus for the immediate release of the applicant for hearing on 16 November 2011.

[25] On 16 November 2011, Mr V Saravanan appeared for the applicant. He informed the court that he was instructed by the applicant to withdraw his application.

[26] Encik Zafran Zafri, learned federal counsel for the respondents had no objection. He left it to the court to decide as it was the second time that the applicant was withdrawing his application on the date fixed for hearing but before it was heard on its merits by the court.

DECISION OF THE COURT

[27] The court struck out the application with no liberty to the applicant to file afresh for a writ of habeas corpus to secure his release from his detention.

[28] Being dissatisfied with the said decision, the applicant has, on 21 November 2011, filed a notice of appeal to the Federal Court against the said decision.

[29] On 22 November 2011, I received a copy of the applicant's notice of appeal together with both the blue coloured case file and the pink coloured appeal file from Puan Halilah bt Suboh, the Deputy Registrar of the Managing Judge's Unit ('the MJU') of the Criminal Division of the Kuala Lumpur High Court for the preparation of the grounds of judgment.

[30] On 6 December 2011, I had composed and typed the grounds of judgment in my pendrive. On the following day, I handed over the pen drive to my relief secretary to print it out as my secretary on her extended Haj leave for 50 days from 14 October 2011 to 14 December 2011. However, due to a mistake she had inadvertently deleted the typed grounds of judgment. So I have recomposed and retyped the grounds of judgment.

REASONS FOR THE SAID DECISION

[31] Below are the reasons why the court made the said decision.

[32] Firstly, it is settled law that an application for a writ of habeas corpus is normally decided after a trial based on affidavits (see *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1994] 1 MLJ 592; [1994] 4 CLJ 47).

[33] In the instant case the respondents had already filed a total of 11 affidavits-in-reply to deny, dispute and rebut all the allegations of fact and law which were raised by the applicant in his supporting affidavit.

[34] Secondly, the court was satisfied that the applicant was abusing the process of court, that he was not sincere in challenging the illegality of his detention and that he had filed the application without any serious intention to

have it heard on its merits and that, therefore, his application ought to be struck out with no liberty to file afresh on the same allegations raised in his application pursuant to O 18 r 19(1)(d) of the Rules of the High Court 1980 ('the RHC 1980') and also the inherent jurisdiction of the court.

[35] The provision states as follows:

> *The Court may at any stage of the proceedings order to be struck out* or amended *any pleading* or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, *on the ground that* —
>
> (a) …;
>
> (b) …;
>
> (c) …; and
>
> (d) *it is otherwise an abuse of the process of the Court*; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be. (Emphasis added.)

[36] In *Malayan Banking Bhd v Teguh Consolidated Sdn Bhd & Anor and another action* [1997] MLJU 245; [1998] 1 CLJ 254, Visu Sinnadurai J observed that in determining whether to strike out cases under O 18 r 19 of the RHC 1980 the courts have wide discretionary powers and the High Court also has an inherent jurisdiction to prevent an abuse of its powers.

[37] In the instant case it is clear that the applicant had filed his application to challenge the validity of his detention under the detention order. He had relied on the numerous allegations of fact and law which were raised by him in his supporting affidavit, encl (2), in order to invoke art and 151(2) of the Federal Constitution, the various provisions of the Act and the Rules and to secure his immediate release from his detention which he has alleged to be illegal, unlawful, null and void.

[38] Since the matter concerned the deprivation of the liberty of the applicant by the respondents it is a very serious matter and his application had to be and was in fact processed expeditiously by the MJU in accordance with the Practice Direction No 1/2010 of the right honourable Chief Justice of Malaysia.

[39] On 20 June 2011, the MJU had issued directions to both the parties concerning the filing of affidavits-in-reply and submissions.

[40] The respondents had complied with the directions and had filed 11 affidavits-in-reply to deny, dispute and rebut all the allegations of fact and law which were raised by the applicant in his supporting affidavit. Instead of

requesting for a postponement on good and valid grounds or filing an affidavit-in-reply or putting in his submissions the applicant's learned counsel has chosen to file a notice of discontinuance on the ground that he did not have the instructions of the applicant to proceed with the hearing.

[41] Thirdly, to grant to the applicant the liberty to file afresh would be a waste of the precious time of the court which could be used to hear and dispose off other cases. It would also lessen the burden of the respondents as they had already filed a total of 11 affidavits-in-reply to deny, dispute and rebut all the allegations of fact and law which were raised by the applicant in his supporting affidavit.

[42] The court took into consideration that a period of more than months had elapsed between the date of the filing of his application vide his originating motion at encl (2) on 6 June 2011 and the first hearing date of his reinstated application on 16 November 2011.

CONCLUSION

[43] Based on the reasons as set out above, the court was satisfied that the decision of the court in striking out the applicant's application, encl (2), for the issue of a writ of habeas corpus to be issued out against the third respondent for his immediate release from his detention with no liberty to file afresh was just and fair to all the parties although the court did not hear the application on its merits.

Application struck out without liberty to file afresh.

Reported by Ashok Kumar